No. 92-1120

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In The

Supreme Court of the United States

October Term, 1992

JOYCE BROWN

and

LOIS SULLIVAN,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT)

and

LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON, and HERMAN HORN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD B. WILKINSON
Counsel of Record
Associate General Counsel
DAVID F. MORRIS
General Counsel
Oklahoma Education Association
Post Office Box 18485
Oklahoma City, OK 73154
(405) 528-7785

DENNIS W. ARROW
Oklahoma City University School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5361

GEORGE WALTERS
700 South Park Drive
Broken Bow, OK 74728
(405) 584-2726

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether state statutes, which provide that public school support employees who have been "employed by a local board of education for more than one (1) year shall be subject to . . . termination *only for cause*," and which provide for hearings prior to such termination, create a property interest sufficient to trigger fourteenth amendment procedural due process protections in cases where a contract is not offered for a succeeding academic year?

II. Whether a fourteenth amendment property interest is created by a school board personnel policy which provides, *inter alia*, that "continuation of employment [for support employees] shall be based on the quality of work, ethical conduct, necessity of the work and the availability of district funds," where a school superintendent has represented to support employees that that policy guarantees reemployment in subsequent years absent the specified delicts?

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REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 974 F.2d 1237 (10th Cir. 1992), and is reprinted in the Appendix to this Petition, at A1-A8.

The Order and Opinion of the United States District Court for the Eastern District of Oklahoma, which

resolved the consolidated cases at that level, is unreported, and is reprinted in the Appendix to this Petition, at B1-B9.

The Judgment of the United States District Court for the Eastern District of Oklahoma is unreported, and is reprinted in the Appendix to this Petition, at C1-C2.

The Order of the United States Court of Appeals for the Tenth Circuit denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is not yet reported, and is reprinted in the Appendix to this Petition, at D1-D2.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was filed on August 24, 1992. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed on September 8, 1992, and was denied by that court on October 2, 1992. This Court has jurisdiction to review the court of appeals' judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The full text of Section 1 of the fourteenth amendment to the United States Constitution is reprinted in the Appendix to this Petition, at E1.

STATUTORY PROVISIONS INVOLVED

The full texts of OKLA. STAT. ANN. tit. 70, § 6-101.40 (West 1989 & Supp. 1992) and OKLA. STAT. ANN. tit. 70, § 6-101.46 (West 1989 & Supp. 1992) are reprinted in the Appendix to this Petition, at F1-F2.

REGULATORY PROVISIONS INVOLVED

The full texts of Sections 2211.2 and 2214 of the Employee Policies and Procedures of Independent School District No. I-06 of McCurtain County, Oklahoma (Haworth School District) are reprinted in the Appendix to this Petition, at G1.

STATEMENT OF THE CASE

Procedurally, the instant case comes before this Court following a court of appeals' affirmance of a district court's award of summary judgment to Respondents.

Petitioner Joyce Brown was employed as a secretary and Chapter 1 aide at a junior high school, within Independent School District No. I-06 of McCurtain County, Oklahoma [hereinafter "school district" or "Respondent school district"], in August 1981. While she was employed during her first year without a contract, in succeeding years she signed a series of annual contracts. She continued to so serve until June 29, 1989, when the school district's Board of Education chose not to offer her reemployment for the succeeding year.

Petitioner Lois Sullivan was employed as a secretary at a high school within Respondent school district in August, 1975. Although not being offered a contract until 1982, she signed a series of annual contracts thereafter until June 29, 1989, when the school district's Board of Education chose not to offer her reemployment for the succeeding year. *See Brown v. Independent School District No. I-06*, No. CIV-90-311C, slip op. at 2-3 (E.D. Okla. Apr. 3, 1991), reprinted *infra* at B2-B3.

No reasons were given for the terminations; Petitioners alleged, however, that their terminations were due to their being related to a couple who were convicted of operating an illegal drug lab near the town in which they were employed. *Id.*, slip op. at 3, reprinted *infra* at B3-B4.

After their requests for hearings were denied, Petitioners Brown and Sullivan brought suit in the United States District Court for the Eastern District of Oklahoma [hereinafter "district court"], pursuant to 42 U.S.C. § 1983, against Respondent school district, its school superintendent (Respondent Herman Horn), and the members of the school district's Board of Education (Respondents Larry Thompson, Chris Columbus, Norman Ranger, James P. Brinkley, and Charles Whittington). The gravamen of the complaint was that Respondents had deprived Petitioners of procedural due process rights by denying them a hearing with respect to their terminations.

Classified as "support employees" pursuant to Oklahoma law, *see* OKLA. STAT. ANN. tit. 70, § 6-101.40 (West

1989 & Supp. 1992),[1] Petitioners Brown and Sullivan contended that Oklahoma statutes, which provide that "support employees" who have been employed by a board of education for more than one year may be suspended, demoted, or terminated "only for cause," *id.*, and which provide for hearings prior to demotion or termination, OKLA. STAT. ANN. tit. 70, § 6-101.46 (West 1989 & Supp. 1992),[2] created a property interest sufficient to trigger procedural due process protections. In the alternative, they maintained that a cognizable property interest was created by published policies of Respondent school board, *see infra* at G1, and *de facto* assurances they received from the school superintendent. *See* Affidavits of Joyce Brown and Lois Sullivan, reprinted in Appendices to Appellant's Brief-in-Chief, at Appendix 4, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058).

Rejecting those contentions, the district court granted summary judgment for all defendants (Respondents herein). Invoking a tenth circuit precedent,[3] it reasoned:

> In this case plaintiffs had a series of year-to-year contracts, each ending on the last day of the school terms. *Plaintiffs' employment was governed by the express terms of the contract.* . . . The [Tenth] Circuit . . . [has] held, if an employee has a valid contract of employment for a definite

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[1] Prior to July 1, 1990, § 6-101.40 was codified as OKLA. STAT. ANN. tit. 70, § 24-133 (West 1989).

[2] Prior to July 1, 1990, § 6-101.46 was codified as OKLA. STAT. ANN. tit. 70, § 24-136 (West 1989).

[3] Petitioners will discuss and distinguish that precedent *infra* at 16-17 n.12.

> term, then the employee has a property interest, protected by the Due Process Clause of the Constitution, in employment for *the duration of the term*.

Brown v. Independent School District No. I-06, No. CIV. 90-311C, slip op. at 5 (E.D. Okla. 1991), reprinted *infra* at B6 (first emphasis added; second emphasis in original). *See also id.*, slip op. at 6-7, reprinted *infra* at B7-B8. The district court applied similar analysis to Petitioners' second contention (based on the published school district policies). *Id.*, slip op. at 7, reprinted *infra* at B8-B9. As to their third (based on the superintendent's reassurances), it concluded that "[p]laintiffs cannot rely on these statements to create a property interest in continued employment. Such a reliance is unilateral and had no legally binding effect on the School District." *Id.*, slip op. at 7, reprinted *infra* at B8.

The court of appeals adopted similar reasoning. Initially articulating the unimpeachable premise that "*[i]n the absence of a statutory or contractual right to renewal*, a person employed under consecutive annual contracts ordinarily can claim no property interest in the indefinite renewal of his or her contract," *Brown v. Independent School District No. I-06*, 974 F.2d 1237, 1239 (10th Cir. 1992), reprinted *infra* at A4 (emphasis added), the court turned its attention to the statutory (and other) protections proffered by Petitioners. Reading "termination" as used in OKLA. STAT. ANN. tit. 70, § 6-101.40 (West 1989 & Supp. 1992) as requiring "termination under an existing contract," the court held that since Petitioners' contract was year-to-year, the protections afforded by that statute simply did not apply. *Brown*, 974 F.2d at 1240,

reprinted *infra* at A6. And in like manner, the court of appeals reasoned that the presence of a one-year contract limited any rights flowing from the school board's published policies as well. *Id.* at 1240-41, reprinted *infra* at A7-A8.

Petitioners will contend herein that these interpretations fundamentally fail to both apprehend and correctly apply this Court's pronouncements concerning the *federal-law* consequences appurtenant to the protections afforded by Oklahoma's statutory scheme, the school board's published policies, and the superintendent's pronouncements regarding the *de facto* operation of the system. Moreover, Petitioners will maintain, the tenth circuit's approach is intolerably at variance with the interpretations of this Court's procedural due process pronouncements which apparently prevail in all other circuits.

REASONS FOR GRANTING THE WRIT

In Oklahoma alone, more than 20,000 school district "support employees" have suddenly[4] had their procedural due process rights curtailed; the same result is now applicable with respect to analogous statutory schemes – both within and without the public school

[4] *See, e.g.*, Goudeau v. Independent School District No. 37, 823 F.2d 1429, 1430 (10th Cir. 1987) (finding that the very same Oklahoma statute relied upon by Petitioners herein created a property right, vested in "support employees" who had been employed for more than one year, to *continued* employment).

context – elsewhere throughout the six-state tenth circuit region.

Moreover, in so holding, that court of appeals has flagrantly disregarded this Court's procedural due process thrust, as reflected in cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). As a result, a consequential inter-circuit split of some magnitude has now ensued.

I. BY PROVIDING THAT TERMINATION OF PUBLIC SCHOOL "SUPPORT EMPLOYEES" CAN BE EFFECTUATED "ONLY FOR CAUSE," OKLAHOMA – AS A MATTER OF *FEDERAL LAW* – HAS CREATED A PROPERTY INTEREST IN EMPLOYMENT *BEYOND ANY PERIODIC CONTRACT TERM* SUFFICIENT TO TRIGGER FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS GUARANTEES.

A. The Existence of a Fourteenth Amendment Property Interest Must be Ascertained as a Matter of Federal Law.

Clearly, the existence *vel non* of a fourteenth amendment-cognizable property interest is a matter of substantive federal law. This Court has unequivocally held that

> [t]he Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source such as state law," *federal constitutional law determines whether that interest rises to*

> *the level of a "legitimate claim of entitlement"* protected by the due process clause.

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978) (emphasis added).

B. Oklahoma's Statutory Scheme Creates a Cognizable Property Interest in Petitioners, Which Extends Beyond the Terms of Their Annual Contracts.

OKLA. STAT. ANN. tit. 70, § 6-101.40 (West 1989 & Supp. 1992)[5] provides in relevant part:

> A support employee who has been employed by a local board of education for more than one (1) year shall be subject to suspension, dismissal, or *termination only for cause*, as designated by the policy of the local board of education, adopted as provided in Section 24-134 of this title.

Id. (emphasis added). *See generally infra* at F1 (quoting the residuum of the provision). OKLA. STAT. ANN. tit. 70, § 6-101.46 (West 1989 & Supp. 1992)[6] goes on to provide that *"prior to any . . . termination*, a support employee shall receive notice of the right to a *hearing*," *id.* (emphasis added), and OKLA. STAT. ANN. tit. 70, § 6-101.47 (West 1989 & Supp. 1992) provides further for the format of that hearing.

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[5] *See generally supra* note 1 (describing former statutory codification). The district court below employed the now-superceded statutory numbering scheme.

[6] See *supra* notes 2, 5.

In the court of appeals below, Respondents protested vigorously that no "termination" had occurred, since Petitioners Brown and Sullivan simply had not been offered new contracts for the succeeding academic year (albeit after eight and fourteen years of service, respectively). *E.g.*, Appellees' Answer Brief at 7, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058) (emphasis in original) ("Brown and Sullivan's contracts *weren't terminated*. Their contracts *expired*."). In one of two versions,[7] the court of appeals adopted the thrust of Respondents' position.

Absent the lower courts' misguided approach to the meaning of "termination" in Oklahoma's statutory scheme, the instant case would undoubtedly have resulted in summary judgment *for Petitioners*. In language too familiar to warrant requotation, this Court, in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), has held that fourteenth amendment-cognizable property interests are created by state law. And in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court (apart from rejecting the "bitter with the sweet" rationale of *Arnett v.*

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[7] The court of appeals' thrust seems to be synthesized in a single sentence: "We hold that in the context of the language of section 6-101.40, failure to renew is not the equivalent of an affirmative act of termination." Brown v. Independent School District No. I-06, 974 F.2d 1237, 1240 (10th Cir. 1992), reprinted *infra* at A6. But the paragraph which immediately follows the above-quoted sentence *may* imply that any statutorily-granted protection may be modified by more restrictive school district contracts. Any such implication will be rebutted in Proposition I-C of this Petition, *infra* at 19-21. The court of appeals' "pure" statutory-interpretation conclusion will be addressed in the instant subsection of this Petition.

Kennedy, 416 U.S. 134 (1974)), found property interests to arise from a statutory scheme remarkably similar to the Oklahoma scheme at issue in this case.

In *Loudermill*, an Ohio statute precluded the dismissal of "classified civil servants" absent cause. OHIO REV. CODE ANN. § 124.34 (Anderson 1984). As has been noted, Oklahoma's scheme provides similar protections to "support employees" who have been employed by a school district for more than one year. OKLA. STAT. ANN. tit. 70, § 6-101.40 (West 1989 & Supp. 1992). In *Loudermill*, Ohio, by statute, provided a hearing remedy by way of appeal. *Loudermill*, 470 U.S. at 539-40 n.6. With respect to the above-described "support employees," Oklahoma does the same. OKLA. STAT. ANN. tit. 70, § 6-101.46 (West 1989 & Supp. 1992).

Moreover, careful examination of the lower court decisions in *Loudermill* does not reveal that Mr. Loudermill *had* a contract with the Board of Education there. *See Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 551-53 (6th Cir. 1983); *Loudermill v. Cleveland Board of Education*, 651 F. Supp. 92, 93-94 (N.D. Ohio 1986). What *is* crystal clear is that neither of those courts gave any weight whatsoever to the presence *vel non* of such a contract. *More importantly, neither did this Court.* But based on the lower courts' reasoning below, *Petitioners Brown and Sullivan, who had annual contracts, are in a worse position with respect to their procedural due process rights than Loudermill, who apparently*[8] *did not*. Based on this Court's

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[8] The only commentary in the lower courts' *Loudermill* opinions which sheds any evidence – even circumstantial – on

procedural due process approach in *Loudermill* (and other cases relating to that issue), *that cannot be the law.*

But the court of appeals below apparently[9] took great comfort from the use of the word "termination" in the relevant Oklahoma statutes; surely, a State may define operative terms as it chooses. Unfortunately (from the standpoint of Respondents' – and the court of appeals' – conclusion), the Oklahoma teacher and "support employee" protective scheme *nowhere defines that term.* With great care, Oklahoma's relevant statutes define "suspension," "dismissal," and "nonreemployment," OKLA. STAT. ANN. tit. 70, § 6-101.3 (West 1989 & Supp. 1992); the Oklahoma legislature has demonstrated quite clearly that it knows how to employ those terms when it so chooses, by employing them throughout the *teacher* procedural due process/property interest scheme. OKLA. STAT. ANN. tit. 70, §§ 6-101.10 - 6-101.30 (West 1989 & Supp. 1992). And *even in the context of the "support employee" statutory scheme,* the Oklahoma legislature – in the context of establishing two *particularized* "causes" for adverse employment actions – employed the statutorily-defined words "dismissal" and "nonreemployment," corroborating still further that it knows how to use those terms when it so chooses. *See* OKLA. STAT. ANN. tit. 70, § 6-101.41 (West 1989 & Supp. 1992). Against that background, its use of the more generic term "termination" in

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this issue is the court of appeals' comment that "[t]he Board of Education accepted Loudermill's application on September 25, 1979. He commenced work immediately thereafter." Loudermill v. Cleveland Bd. of Educ., 721 F.2d at 552.

[9] *See supra* note 7.

OKLA. STAT. ANN. tit. § 6-101.40 (West 1989 & Supp. 1992) cannot be other than purposeful. In consequence, the court of appeals' unsupported interpretation of "termination" as nothing more than a metonym for "dismissal" is not only arbitrary but illogical as well.

Manifestly, "termination," not otherwise statutorily defined, is a sufficiently broad term to encompass the consequences which accrued to Petitioners herein. Such a conclusion is supported by "ordinary meaning" analysis, relevant and codified Oklahoma interpretive norms, extrinsic Oklahoma caselaw, the consequences of an alternative conclusion, and the thrust of this Court's (and other circuits') procedural due process analysis. In pursuing this line of argument, Petitioners will turn first to the "ordinary meaning" precept.

Following a somewhat circular definition of "termination" ("a terminating or being terminated"), the most recent edition of Webster's unabridged dictionary lists as its preferred definition, "*the end of something in* space or *time; limit, bound, conclusion* or *finish.*" WEBSTER'S UNABRIDGED DICTIONARY 1883 (2d ed. 1983) (emphasis added). Beyond a shadow of doubt, by not being offered contracts for the succeeding academic year, Petitioners' eight and fourteen year careers were "ended in time," "limited," "bound," "concluded," and "finished." The "plain meaning" interpretive canon permits no other conclusion.

Second, the Oklahoma legislature itself has provided for a "liberal" interpretive canon when school code provisions are "found to be ambiguous or otherwise subject to

more than one interpretation. . . . " OKLA. STAT. ANN. tit. 70, § 1-103 (West 1989). While Petitioners respectfully submit that the statute's meaning is plain, the relevant *statutorily-prescribed* interpretive canon mandates liberal construction.

Third, extrinsic Oklahoma caselaw points in a similar direction. Even during the pendency of the "bitter with the sweet" approach of *Arnett* (and *Bishop v. Wood*, 426 U.S. 341 (1976)), the Oklahoma Supreme Court strained to find procedural due process protections for employees whose termination is limited to "good cause" – when necessary (given *Arnett*'s approach) – in the *Oklahoma Constitution's* due process clause. *See Umholtz v. City of Tulsa*, 565 P.2d 15, 22-25 (Okla. 1977). Perhaps even more significantly, that court, interpreting *Umholtz* three years later (and still during the pendency of the "bitter with the sweet" approach), construed that case as follows:

> In *Umholtz v. City of Tulsa*, this court examined a provision of the Charter of the City of Tulsa which provided that all city employees would hold their respective positions "during good behavior" and would be "suspended without pay, demoted, or *removed from the same only for good and sufficient cause.*" The court found that *this language did confer a property right in continued employment*. . . . [10]

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[10] Following the ellipsis in the quotation, the Oklahoma Supreme Court did go on to note that the property right was "defined and limited . . . by the procedural language of the provision." Hall v. O'Keefe, 617 P.2d 196, 200 (Okla. 1980). But that observation was a function of the "bitter with the sweet" rationale then in force.

Hall v. O'Keefe, 617 P.2d 196, 200 (Okla. 1980) (citation omitted) (emphasis added). No mention was made of any limitation of the property interest to the duration of any employment contract then in force. *Cf. Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985) (construing *Umholtz* in light of this Court's subsequent decision in *Loudermill*).

Fourth, the practical consequences of the court of appeals' conclusion demonstrate its logical untenability: although no known interpretive canon permits construing a statutory provision into meaninglessness when an alternative equally viable (in the instant case, more viable) interpretation is available, that is precisely the result of the court of appeals' crabbed construction of "termination."

OKLA. STAT. ANN. tit. 70, § 5-123 (West 1989) provides in part that "[n]o expenditure involving an amount greater than Five Hundred Dollars ($500.00) shall be made by a board of education except in accordance with the provisions of a written contract. . . . "; an Oklahoma Attorney General's Opinion has held that this statute expressly covers expenditures for the remuneration of school district "support employees." Op. Att'y Gen. 82-62 (Okla. 1982). Thus, Petitioners' Brown and Sullivan's contracts, described earlier, were mandated by state law.[11]

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[11] It is important to reemphasize at this juncture, however, that while § 5-123 creates a right *to a contract*, the gravamen of Petitioners' instant contention is that *independent* of any contract, § 6-101.40 creates a property interest in Petitioners' retention of their *employment status*.

Roth and its progeny make clear that independent of state statutes, fourteenth amendment-cognizable property interests may be created by contract as well. Thus, Petitioners' *contracts* already created property interests *for the terms of those contracts*. If, as the court of appeals below concluded, the protections afforded support employees by OKLA. STAT. ANN. tit. 70 §§ 6-101.40, 6-101.46 (West 1989 & Supp. 1992) are limited to "termination[s] under an extant contract," *Brown v. Independent School District No. I-06*, 974 F.2d 1237, 1240 (10th Cir. 1992), reprinted *infra* at A6,[12] then the *statutory* due process protections afforded "support employees" are no

[12] The court of appeals' reliance, *see* Brown v. Indep. School Dist. No. I-06, 974 F.2d 1237, 1270 (10th Cir. 1992), reprinted *infra* at A6, on Cole v. Ruidoso Mun. Schools, 947 F.2d 903 (10th Cir. 1991), is materially misguided. While that decision did, in fact, limit a school principal's property interest to the term of her one-year contract, *id.* at 905-06, no state statute (unlike in the instant case) created any *independent* property interest in her employment. Worse yet, the relevant New Mexico statute, N.M. STAT. ANN. § 22-10-11(E) (1978) (emphasis added) expressly provides:

> Except as provided in Section 22-10-12 NMSA 1978, *a person employed by contract pursuant to this section has no legitimate objective expectancy of reemployment, and no contract entered into pursuant to this section shall be construed as an implied promise of continued employment pursuant to a subsequent contract.*

The same may be said of the court of appeals' reliance on Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989). To be sure, that case also rejected a property interest claim beyond the term of a contract. But in that case, as in *Cole*, no state statute created any independent property interest. And the *Moore* plaintiffs' only alleged basis for the existence of a cognizable property interest was that their names and resumes had been solicited by a day-care center's Board. *See Id.* at 550.

Nor can the court of appeals' rationale find solace in the

more than an illusory cruel joke, protecting against nothing not already protected against by contract.

Fifth, the tenth circuit's novel procedural due process approach is incongruent with the approaches taken by other courts of appeals – following *Roth* and *Loudermill* –

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only other case it cites in support of the instant conclusion. As in *Cole* and *Moore*, the court in Burris v. Willis Indep. School Dist., 713 F.2d 1087 (5th Cir. 1983), concluded that the complainant's property interest expired with the term of his contract. But in *Burris*, state statutes limited *maximum* contract terms. TEX. EDUC. CODE ANN. § 23.28(b) (Vernon 1972). And the *Burris* court expressly noted: "Any claim by Burris that he had a property interest under the Texas continuing contract law is foreclosed by the fact that the [school district] never adopted its provisions." *Burris*, 713 F.2d at 1090 n.1. TEX. EDUC. CODE ANN. § 13.101 (Vernon 1991) provides Texas school districts with the *option* of offering "continuing" or "fixed term" contracts, Wells v. Hico Indep. School Dist., 736 F.2d 243 (5th Cir. 1984), *cert. den.*, 473 U.S. 901 (1985), with procedural due process rights created by state law only as to the former.

Apart from the cases cited by the court of appeals, the district court below took comfort from Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987). *See* Brown v. Indep. School Dist. No. I-06, No. CIV-90-312C, slip op. at 5 (E.D. Okla. 1991), reprinted *infra* at B6. Like the court of appeals' authority, *Sullivan*, too, is inapposite. As did *Cole*, *Moore*, and *Burris*, *Sullivan* involved the rejection of a property interest claim to employment beyond a particular contract's duration, in this case, one advanced by a *seasonal* park ranger. As with the court of appeals' cited precedents, relevant statutes and (in this case, United States Department of Interior) regulations created no legitimate claim of entitlement to employment beyond the specified contractual term. As in *Cole* and *Burris*, relevant statutes *expressly disclaimed* the creation of such an interest. *Sullivan*, 808 F.2d at 740; 5 U.S.C. §§ 7511(a)(1), 7513(b) (1988).

on that issue. Ignoring the existence *vel non* of employment contracts for a particular term, courts of appeals have unequivocally found that "public employee[s] who can be *terminated* only for cause . . . may legitimately claim an entitlement to a property interest in *continued* employment." *See Nolin v. Douglas County*, 903 F.2d 1546, 1553 (11th Cir. 1990) (emphasis added); *see also, e.g., Plaza Health Laboratories, Inc., v. Perales*, 878 F.2d 577, 581 (2d Cir. 1989); *Bradley v. Colonial Mental Health & Retardation Services Board*, 856 F.2d 703, 707 (4th Cir. 1988); *Moore v. Warwick Public School District*, 794 F.2d 322, 326 (8th Cir. 1986). Indeed, when the facts of the cases are analyzed, diligent research has revealed *not a single case from any other circuit which supports the tenth circuit's restrictive procedural due process approach. See, e.g., supra* at 16-17 n.12.

Petitioners are well aware that the gravamen of the *Arnett/Bishop* "bitter with the sweet" approach was that where limitations on available *procedures* were intertwined with the granting of a substantive property interest, those *procedures* inherently qualified that property interest. Manifestly, the tenth circuit's approach below does not involve the conditioning of property interests with less-than-otherwise-adequate *procedures*. But by virtue of its crabbed reading of the protections against termination in the Oklahoma statutory provisions, the court of appeals below has created an unprecedented (though distinct) version of a *new* "bitter with the sweet" approach, by virtue of which statutory property-interest grants are qualified – *judicially* – by the duration of an otherwise-extant contract of employment. Petitioners respectfully submit that that is not the law.

C. Both Federal and State Law Preclude a School District From Contractually Diminishing, Conditioning, or Impairing a Property Interest Once Such an Interest Has Been Created by State Law.

The court of appeals' use of a school district *contract* to construe a state *statute* (assuming that to be a component of its reasoning)[13] is a counterintuitive and novel interpretive approach, to say the least. To say a bit more, such an approach is tolerated by neither Oklahoma law nor this Court's procedural due process pronouncements.

Oklahoma state law (unlike, for example, that of Texas)[14] does not permit school districts to *select* a property-interest scheme pursuant to which "support employees" may be employed. The Oklahoma scheme, in providing that "support employees" employed by a board of education for more than one year "*shall* be subject to . . . termination only for cause," OKLA. STAT. ANN. § 6-101.40 (West 1989 & Supp. 1992) (emphasis added), is categorical.

While the Oklahoma Constitution prohibits contracts which purport to waive state *constitutional* rights, OKLA. CONST. art. XXIII, § 8, it is true that no *constitutional* provision precludes the waiver of *statutory* rights. But it is also true that neither the court of appeals nor the district court below cited any authority whatsoever in support of the conclusion that property interests created

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[13] *See supra* note 7.

[14] *See supra* note 12 (citing TEX. EDUC. CODE ANN. § 13.101 (Vernon 1991); Wells v. Hico Indep. School Dist., 736 F.2d 243 (5th Cir. 1984), *cert. den.*, 473 U.S. 901 (1985)).

by § 6-101.40 can be contractually waived (nor, for that matter, did Respondents in any of their briefs below).

Cognizant of presumptive legislative intent to redress employer/employee bargaining imbalances, this Court, and numerous other courts, have often limited the waivability of statutorily created employee-protective rights in *non*-procedural-due-process contexts. *E.g., D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) (Fair Labor Standards Act). Such issues have generally been resolved pursuant to findings of express or implied legislative intent. *E.g., id.* at 115-16.

Within the procedural due process arena, this Court has stated that

> the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.

Loudermill, 470 U.S. at 503.

While Petitioners will maintain (should this Court grant the Writ herein) that this Court should now fashion a *per se* federal rule precluding governmental employers from contractually (or otherwise) negating property interests once created by state statute, Respondents cannot prevail even pursuant to the non-procedural-due-process "legislative intent" approach. For in light of both Oklahoma's statutorily-prescribed "liberal interpretation" canon, *see supra* at 13-14, and the emphasis and thrust of the Oklahoma Supreme Court's pronouncements on the § 6-101.40 issue, *see, e.g., Hall v. O'Keefe*, 617 P.2d 196, 200 (Okla. 1980); *Umholtz v. City of Tulsa*, 565 P.2d 15, 22-24 (Okla. 1977), no speculation is required to resolve in the

negative the instant state law contractual-waivability issue. No authority whatsoever has been cited in support of the opposite conclusion.

While fourteenth amendment-cognizable property interests are created by state law, *e.g.*, *Roth*, 408 U.S. at 577, the rights which flow from those state-created interests are manifestly federal rights. *Memphis Light*, 436 U.S. at 9. Thus, absent a state-law basis for contractual limitations on statutorily-created property interests, federal law as well as state precludes a contractually-imposed diminution or negation of such interests. But beyond that near-tautological conclusion, perhaps more important – from the standpoint of national precedent – is the Petitioners' contention that *this Court should now fashion a* per se *federal rule precluding governmental employers from contractually (or otherwise) negating property interests once created by state statute.*

II. RESPONDENT SCHOOL BOARD'S PUBLISHED PERSONNEL POLICIES CREATED AN INDEPENDENT PROPERTY INTEREST IN CONTINUED EMPLOYMENT FOR "SUPPORT EMPLOYEES," SUFFICIENT TO TRIGGER PROCEDURAL DUE PROCESS GUARANTEES.

As is by now apparent, the court of appeals below placed great reliance on the restrictive interpretation which it placed on the word "termination" in OKLA. STAT. ANN. tit. 70, § 6-101.40 (West 1989 & Supp. 1992). But although the court of appeals applied virtually (if not entirely) the same analysis to Petitioners' proffered school-board-personnel-policy-based property interest

contention, the language of the published personnel policy *differs materially* from the language of § 6-101.40. Rather than employing the term "termination," Respondent school board's policy provides (under the manifestly generic topic heading *"separation"*): "The *continuation of employment* shall be based on the quality of work, ethical conduct, necessity of the work, and the availability of district funds." EMPLOYMENT POLICIES AND PROCEDURES OF INDEPENDENT SCHOOL DISTRICT NO. I-06 OF MCCURTAIN COUNTY, OKLAHOMA, § 2214, reprinted *infra* at G1 [hereinafter Policy]. Without belaboring the dictionary-definition and "plain meaning" points, Petitioners Brown and Sullivan were clearly "separated" from their preexistent employment. Manifestly, their "continuation of employment" was terminated. Equally clear is that absent a procedural due process hearing (and absent any articulated reason for the disruption whatsoever), Petitioners lacked any opportunity to demonstrate that their work was necessary, that district funds were available, that their conduct was ethical, and their quality of work satisfactory. Yet the court of appeals below again invoked Petitioners' employment contracts as limiting the legitimate expectation of continuing employment created by the Policy. Apparently focusing on earlier sections of the Policy (although the linguistic distinctions between the state statute and § 2214 of the Policy had been argued in some detail below, *see* Appellants' Brief in Chief at 17-18; Reply Brief of Appellants 18-20, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058)), the court of appeals' three sentences of analysis on this vital issue, *see Brown*, 974 F.2d at 1240-41, reprinted *infra* at A8, made not even a passing nod to

§ 2214, failing to recognize the breadth of the sweep of "separation" and "continuation of employment" therein.

Although it is clear beyond doubt that under Oklahoma law, provisions in a personnel manual can establish a fourteenth amendment-cognizable property interest, *see, e.g., Vinyard v. King*, 728 F.2d 428, 432-33 (10th Cir. 1984), the court of appeals below was remarkably unconcerned with the details of the Policy's provisions; its reasoning on that issue was consequentially and perceptively vacuous.

Moreover, since the instant case comes before this Court following the award of summary judgment to Respondents, all uncontroverted allegations in Petitioners' affidavits must be taken as true. FED. R. CIV. P. 56(e). Petitioners' uncontroverted affidavits both indicated that Respondent Horn, the school superintendent, had made a number of representations to each of them (over a lengthy period of time) to the effect that their positions were "permanent and not temporary as long as I [Brown] did my job satisfactorily;" that "I [Sullivan] had nothing to worry about as long as I was doing the work satisfactorily," and the like. *See* Affidavit of Joyce Brown at 1, 2; Affidavit of Lois Sullivan at 1, 2, Appellants' Brief in Chief at Appendix 4, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058). Not only should such allegations establish a claim of *de facto* "tenure" under *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972), but they also further support Petitioners' claims to property interests pursuant to § 2214 of the Policy, since *Respondent Horn – the school superintendent – apparently shared* in toto *the view of that Policy advanced by Petitioners herein*. Unfortunately (from the standpoint of

Petitioners' lengthy careers), the school superintendent apparently gave more studied consideration to that Policy than did the court of appeals below.

CONCLUSION

Petitioners respectfully submit that the quantitative effect of the instant case is great, affecting – *immediately* – more than 20,000 "support employees" in Oklahoma's schools. Similarly-situated public employees, both inside and outside of public school systems, are equally and consequentially affected throughout the tenth circuit region.

From a doctrinal analysis perspective, the issues raised by this case are equally weighty. The tenth circuit's limitation of "termination only for cause" protections to the duration of extant contracts (and its restrictive view of "termination") is in conflict with other circuits' more categorical views, and the thrust of this Court's modern procedural due process pronouncements. Moreover, Petitioners respectfully submit that any suggestion that governmental employers should be permitted to contractually negate the existence of employment property interests, once granted by state statutes, should be met with a prohibitory fourteenth amendment *per se* rule from this Court.

Since the instant case comes before this Court following affirmance of an award of summary judgment to Respondents, this Court need resolve no factual disputes should it grant the Writ herein.

Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit. Alternatively, Petitioners respectfully pray that this Court grant the Writ herein, summarily vacate the opinion of the court of appeals below, and remand in light of appropriate precedents of this Court.

Respectfully submitted,

RICHARD B. WILKINSON
Counsel of Record
Associate General Counsel
DAVID F. MORRIS
General Counsel
Oklahoma Education Association
Post Office Box 18485
Oklahoma City, OK 73154
(405) 528-7785

DENNIS W. ARROW
Oklahoma City University
School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5361

GEORGE WALTERS
700 South Park Drive
Broken Bow, OK 74728
(405) 584-2726

Counsel for Petitioners

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOYCE BROWN, LOIS SULLIVAN,
Plaintiffs-Appellants,
v.
INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON; CHRIS COLUMBUS; NORMAN RANGER; JAMES P. BRINKLEY; CHARLES WHITTINGTON; HERMAN HORN,
Defendants-Appellees.

No. 91-7058

(Filed Aug. 24, 1992)

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. Nos. CIV-90-311-C & CIV-90-312-C)

Richard B. Wilkinson of the Oklahoma Education Association, Oklahoma City, Oklahoma (George Walters, Broken Bow, Oklahoma, with him on the brief) for Plaintiffs-Appellants.

Jerry A. Richardson of Rosenstein, Fist & Ringold, Tulsa, Oklahoma, for Defendants-Appellees.

Before **LOGAN, BALDOCK,** and **EBEL,** Circuit Judges.

EBEL, Circuit Judge.

In this appeal, we address whether two support personnel employed by a school district had a property interest in the renewal of their annual contracts. We agree with the district court that neither statute nor school board policy provided any such property interest, and accordingly we affirm the summary judgment entered for the defendants.

I. Background

The appellants in this action, Joyce Brown and Lois Sullivan, worked as secretaries for the appellee school district for a number of years until the district declined to renew their contracts. Oklahoma law classifies secretaries who work for an Oklahoma public school system as "support employees." Support employees include essentially all school district personnel other than teachers and administrators.

Joyce Brown began her employment with the school district in August 1982 and continued to work for the district until June 1989. She signed a new employment contract every year. Lois Sullivan began her employment with the school district in August 1975. She worked without a written employment contract until August 1982. From that point on, she worked under successive annual contracts until June 1989.

The last contract signed by each appellant contained the following provision:

> The contract term shall be . . . [o]n a month to month basis during the school year, beginning on the 15[th] day of August, 1988, and continuing each month thereafter for the balance of the school fiscal year unless employment is terminated, but in no event to extend beyond June 30, 1989 unless a new written contract is entered into by the parties . . . .

Appellees' Answer Br., Attach. 1. The previous contracts were substantially identical, with only the appropriate dates differing.

The school district renewed the appellants' employment contracts every year until 1989. In June of that year, the school board voted not to enter into a new contract with either appellant. The board did not provide any reason for its decision. The appellants allege, however, that the board declined to renew their contracts because they are related to individuals convicted of various drug offenses.

The appellants requested a hearing with the board to discuss the reasons for its failure to renew their contracts. The board, through its attorney, refused to provide such a hearing. The appellants then filed suit in the United States District Court for the Eastern District of Oklahoma. They asserted a claim under 42 U.S.C. § 1983, alleging that the school district had terminated their employment without notice or a hearing in violation of their procedural due process rights guaranteed by the Fourteenth Amendment. The district court granted summary judgment for the appellees, holding that the appellants did

not have a protected property interest in continued employment beyond the terms of their contracts and that *therefore no violation of their due process rights had* occurred. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Discussion

The appellants' "federal constitutional claim depends on their having had a property right in continued employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (footnote and citations omitted). In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Supreme Court explained the source of a property interest:

> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Thus, to show that they had a property right in continuing employment from year to year, the appellants must point to some source that provides "a legitimate claim of entitlement to" that interest. *Id.*

In the absence of a statutory or contractual right to renewal, a person employed under consecutive annual contracts ordinarily can claim no property interest in the indefinite renewal of his or her contract. *See Burris v. Willis Indep. Sch. Dist., Inc.*, 713 F.2d 1087, 1090-91 (5th Cir. 1983). The appellants therefore cannot rely upon the

six successive renewals of their employment contracts as evidence of the existence of a property right.

The appellants argue instead that their property right arose under two bases: state law and school district policy. Because the appellants appeal a summary judgment, we review their arguments de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

A. Statutorily-based property right

The appellants argue that state law provided them with a property right in continued employment. Specifically, the appellants rely on an Oklahoma statute, which provides in relevant part:

> A support employee who has been employed by a local board of education for more than one (1) year shall be subject to suspension, demotion or termination only for cause, as designated by the policy of the local board of education . . . . This section shall not be construed to prevent layoffs for lack of funds or work.

Okla. Stat. tit. 70, § 6-101.40 (formerly codified as Okla. Stat. tit. 70, § 24-133). Thus, under the explicit terms of the statute, a covered support employee may be "terminated" only for (1) "cause," (2) "lack of funds," or (3) "lack of . . . work."

We construed the former codification of section 6-101.40 in *Goudeau v. Independent School District No. 37*, 823 F.2d 1429 (10th Cir. 1987). The plaintiff in *Goudeau* worked as a preschool aide in an Oklahoma school district. Two weeks into a new school year, the plaintiff's

supervisor notified her of the termination of her employment. *Id.* at 1430 & n.1. We held that the former codification of section 6-101.40 provided the plaintiff with a property interest in her employment and entitled the plaintiff to a pretermination hearing. *Id.* at 1430-31.

In the instant case, the school board did not terminate the appellants' contracts during the term, as the school district in *Goudeau* attempted to do. Rather, the school board here elected simply not to renew the appellants' contracts after they expired. We hold that in the context of the language of section 6-100.40, failure to renew is not the equivalent of an affirmative act of termination. *Cf. Cole v. Ruidoso Mun. Sch.*, 947 F.2d 903, 904 n.1 (10th Cir. 1991) (distinguishing "discharge" from "nonrenewal"); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 550 (5th Cir. 1989) (plaintiffs "were not fired as such, rather their contracts were not renewed").

Although the appellants' employment did end upon the expiration of their contracts, we read "termination" as used in the statute to require termination under an extant contract. In this case, given that (1) the contract stated explicitly that its term ended in June unless renewal occurred and (2) an individual cannot claim a property right in renewal of a contract based only on previous renewals of it, *see Burris*, 713 F.2d at 1090-91, we cannot view the school board's failure to offer new contracts to the appellants as acts of termination within the meaning of section 6-101.40. Therefore, the school board did not deprive the appellants of the property right explicated in *Goudeau*.

B. School Board Policy

The appellants also argue that school board policies give rise to a property interest in continued employment. An individual "who has held his position for a number of years[ ] might be able to show from the circumstances of this service – and from other relevant facts – that he has a legitimate claim of entitlement to job tenure." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). However, "a mere subjective 'expectancy' " is not enough. *Id.* at 603; *see also Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

In this case, the appellants rely on school board policies as enunciated in a policy handbook. Specifically, the section on "separation" states:

> The continuation of employment shall be based on the quality of work, ethical conduct, necessity of the work and the availability of district funds. Unless the continued presence of a person on a job is highly detrimental to the school system, two weeks notice shall be given before dismissal.
>
> Likewise, employees shall give two weeks notice of resignation.

App. to Appellants' Br. in Chief, Tab 3.

We recognize that in Oklahoma "[t]he provisions of an employee handbook can constitute a contract between the employer and employee." *Vinyard v. King*, 728 F.2d 428, 432 (10th Cir. 1984). However, in this case, we do not

believe that the provision of the policy manual cited creates a property right to renewal of the appellants' annual contracts, particularly in light of the explicit provision in the appellants' contracts that the term expired at the end of the school fiscal year and continued "in no event . . . beyond June 30, 1989." The provision in the policy manual does little more than restate the requirements for termination, suspension, and demotion contained in section 6-101.40: cause, lack of funds, and lack of work. Given the use of the words *dismissal* and *resignation*, neither of which applies upon expiration of a contract, we interpret the provision to refer to termination of an existing contract rather than to a failure to renew a contract.

III. Conclusion

The appellants had no property right to renewal of their annual contracts, and the school board therefore owed them no constitutional obligation to provide a due process hearing. Accordingly, we AFFIRM the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JOYCE BROWN,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON and HERMAN HORN.

Defendants.

and

LOIS SULLIVAN,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON and HERMAN HORN.

Defendants.

No. CIV-90-311-C

(consolidated)

No. CIV-90-312-C

(Filed April 3, 1991)

ORDER

This matter is before the Court on the motion of defendants to dismiss. Upon proper notice, the Court has converted defendants' motion to a motion for summary judgment. Plaintiffs bring this action asserting claims under 42 U.S.C. § 1983 and pendent state claims. Plaintiffs are former secretaries for the Independent School District No. I-06 of McCurtain County, Oklahoma (School District). Plaintiffs contend that the School District terminated their employment without notice and an opportunity for a hearing, in violation of their rights to procedural due process guaranteed by the Fourteenth Amendment.

The following facts are undisputed unless set forth as a specific allegation of a plaintiff:

1. Plaintiff Joyce Brown was employed as a junior high school secretary with the School District from August, 1982 until June, 1989.

2. Plaintiff Lois Sullivan was employed as secretary to the high school principal from August, 1975 until June, 1989.

3. All school employees fall into one of two categories, (1) certificated personnel, such as teachers and administrators, or (2) support employees[1], such as

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[1] *Support employees are defined in the School District's personnel policy booklet as "a full-time employee of a school district who provides those services, not performed by professional educators or licensed teachers, that are necessary for the efficient and satisfactory functioning of a school district."*

secretaries, bus drivers, cafeteria workers and custodians. Plaintiffs were classified as support employees.

4. In each year of her employment Joyce Brown signed a contract which provided for employment on a month-to-month basis for a term of one school year.

5. Plaintiff Lois Sullivan did not sign a contract until 1982. Thereafter she signed a month-to-month employment contract for each school year.

6. Both plaintiffs were offered their jobs by the superintendent for the School District. Plaintiff Joyce Brown asserts that she resigned her previous job on the superintendent's assurance that the school position was permanent and provided a retirement plan.

7. Both plaintiffs were informed that they could participate in the retirement plan and that group medical insurance would be provided at a reduced cost.

8. Both plaintiffs participated in the retirement and medical insurance plans during their respective years of employment.

9. At a special meeting on June 29, 1989, the School Board voted to have the superintendent notify plaintiffs and two others that the School Board did not intend to enter into a contract of employment with them for the following year.

10. No reason was given for not renewing their contracts.

11. Plaintiffs contend that they were terminated because they both were related to a man and woman who

were convicted in Federal Court of operating an illegal drug lab near Haworth.

12. On June 30, 1989 Mr. Horn, the superintendent, notified plaintiffs by letter of the School Board's decision.

13. On July 8, 1989 both plaintiffs requested a hearing concerning the nonrenewal of their contracts.

14. Both plaintiffs were notified on July 18 that their request for hearing was denied.

The dispositive issue before the Court is whether a support employee for the defendant School District has a constitutionally protected property right in continued employment which would require notice and a hearing within ten days of the School Board's decision not to renew an employment contract.[2]

In support of their motion defendants rely on the language contained in each plaintiff's contract:

> The contract term shall be . . . on a month to month basis during the school year, beginning on the 15 [sic] day of August, 1988, and continuing each month thereafter for the balance of the school fiscal year unless employment is terminated, but in no event to extend beyond June 30, 1989 unless a new written contract is entered into by the parties . . .

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[2] *In their original complaint plaintiffs assert that they were also denied equal protection of the laws. However plaintiffs have failed to set forth any facts in support of such a claim and therefore their equal protection claim is summarily denied.*

Based on this language, defendants assert that the School Board had an unconditional right not to renew a contract which expired by its own terms.

In response, plaintiffs rely on the language contained within the personnel policy booklet, which is derived from Oklahoma statutory law.[3] In the subsection styled "Suspension, Demotion or Termination of Support Employees", the booklet provides:

> No support employee who has been employed in Haworth School District for one year or more may be suspended, demoted, or terminated by the Superintendent except for the causes set out by the policy.

The policy manual lists forty-two reasons qualifying as cause for suspension, demotion or termination. Plaintiffs assert that they had not violated any of the listed causes. Defendants do not dispute this contention.

Under the subsection "Separation" the booklet provides:

> The continuation of employment shall be based on the quality of work, ethical conduct, necessity of the work and the availability of district funds. Unless the continued presence of a person on a job is highly detrimental to the school system, two weeks notice shall be given before dismissal.
>
> Likewise, employees shall give two weeks notice of resignation.

---

[3] *70 O.S. §§ 24-132 through 24-136.*

Plaintiffs assert that this policy provision gives them a reasonable expectation of continued employment.

The question whether an individual has a property interest in continued employment must be determined by looking to state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Roth*, the Supreme Court defined a property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement.

408 U.S. at 577.

In this case plaintiffs had a series of year-to-year contracts, each ending on the last day of the school terms. Plaintiffs' employment was governed by the express terms of the contract. The Tenth Circuit has stated that employment status is crucial in evaluating a constitutional claim to procedural due process. *Sullivan v. Jack Stark*, 808 F.2d 737 (10th Cir. 1987). The Circuit Court held, if an employee has a valid contract of employment for a definite term, then the employee has a property interest, protected by the Due Process Clause of the Constitution, in employment for *the duration of the term. Id.* (citing *Board of Regents v. Roth, supra.*)

In this case, plaintiffs were not terminated during the term of their contract. They were both terminated after their respective 1988-89 contract had expired on its own terms. The personnel policy provisions relied upon by plaintiffs only come into play if a support employee is suspended, demoted or terminated *prior* to the duration

of the term of the employment contract. Plaintiffs' situation is undistinguishable from the facts of *Roth* in which the Supreme Court found that an untenured university professor had no guarantee that the university would renew his school-year contract. On that basis the Supreme Court held that *Roth* lacked a property interest sufficient to require the university to give him a hearing. 408 U.S. at 578-579. The same conclusion is applicable here. Plaintiffs' property rights extend through the duration of the express language contained within their respective contracts. The contract creates and limits the property interest. The School District policy booklet requires that a support employee can be terminated only for cause during the term of the contract (if the employee has been with the School District in excess of one year), but the policy booklet provides no requirement that the contract will be renewed once the term expires.

Plaintiffs' secondary contention that Oklahoma statutory law provides them a continuing expectation of employment is equally without merit. Oklahoma law, 70 O.S. § 24-133 provides:

> A support employee who has been employed by a local board of education for more than one year shall be subject to suspension, demotion or termination only for cause, as designated by the policy of the local board of education . . . this section shall not be construed to prevent layoffs for lack of funds or work. For purposes of this act, "support employee" means a full-time employee of a school district as determined by the standard period of labor which is customarily understood to constitute full-time employment . . . and who provides those services, not

> performed by professional educators or licensed teachers, which are necessary for the efficient and satisfactory functioning of a school district.

This statute does not speak to contract renewal, and does not modify the School District's policy regarding support employees.

Plaintiffs also contend that the superintendent, Mr. Horn, had made verbal assurances of continued employment to both plaintiffs and that the plaintiffs relied on those assurances to their detriment. Plaintiffs contend that Mr. Harris' statements gave them a reasonable expectation of continued employment.

Plaintiffs cannot rely on these statements to create a property interest in continued employment. Such a reliance is unilateral and had no legally binding effect on the School District.

The Oklahoma legislature has granted the authority to employ support employees to the School Board. Oklahoma law provides in 70 O.S. § 5-117 (1990 Supp.), as follows:

> A. The board of education of each school district shall have the power to:
>
> . . .
>
> 14. Contract with and fix the duties and compensation of . . . superintendents, principals, teachers, bus drivers, janitors, and other necessary employees of the district.

The School Board has no authority under law to delegate its authority to the superintendent to contract with support employees. Where Oklahoma law explicitly delegates the authority to set terms of public employment,

those terms cannot be altered by other officials to legally bind the School District. *See, e.g., Graham v. City of Oklahoma City,* 859 F.2d 142, 146 (10th Cir. 1988).

IT IS THEREFORE ORDERED that the motion of defendants Independent School District *et al.,* for summary judgment is hereby granted. This Order renders all other pending motions moot.

IT IS SO ORDERED this 3rd day of April, 1991.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

JOYCE BROWN, Plaintiff, vs. INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON and HERMAN HORN. Defendants. and LOIS SULLIVAN, Plaintiff, vs. INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON and HERMAN HORN. Defendants.	No. CIV-90-311-C (consolidated) No. CIV-90-312-C (Filed April 3, 1991)

JUDGMENT

This matter came before the Court for consideration of defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendants and against the plaintiffs Joyce Brown and Lois Sullivan.

IT IS SO ORDERED this 3rd day of April, 1991.

/s/ H. Dale Cook
H. DALE COOK
United States
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOYCE BROWN, LOIS SULLIVAN, Plaintiffs-Appellants, v. INDEPENDENT SCHOOL DISTRICT NO. I-06 OF MCCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT); LARRY THOMPSON; CHRIS COLUMBUS; NORMAN RANGER; JAMES P. BRINKLEY; CHARLES WHITTINGTON; HERMAN HORN, Defendants-Appellees.	No. 91-7058 (D.C. Nos. CV-90-311-C CV-90-312-C

ORDER
Entered October 2, 1992

Before MCKAY, Chief JUDGE, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, BRORBY, EBEL, KELLY, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/Patrick Fisher
Patrick Fisher
Cheif (sic) Deputy Clerk

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, amend. XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Okla. Stat. tit. 70, § 6-101.40

§ 6-101.40 Suspension, demotion or termination of support employee for cause

A support employee who has been employed by a local board of education for more than one (1) year shall be subject to suspension, demotion or termination only for cause, as designated by the policy of the local board of education, adopted as provided in Section 24-134 of this title. This section shall not be construed to prevent layoffs for lack of funds or work. For purposes of this act, "support employee" means a full-time employee of a school district as determined by the standard period of labor which is customarily understood to constitute full-time employment for the type of services performed by the employee who is employed a minimum of one hundred seventy-five (175) days and who provides those services, not performed by professional educators or licensed teachers, which are necessary for the efficient and satisfactory functioning of a school district.

Okla. Stat. tit. 70, § 6-101.46

§ 6-101.46. Procedure for disciplinary action

A. After any suspension or prior to any demotion or termination, a support employee shall receive notice of the right to a hearing. The hearing shall be conducted by the local board of education. All notices shall be by certified mail, with the postmark used to determine the

timeliness of the notice. Failure of the employee to request a hearing within then (10) working days of such notice shall be considered a waiver of the employee's right to a hearing.

B. If an employee is to be suspended for a period to exceed ten (10) days, the superintendent of the district shall initiate proceedings for termination and shall follow the procedures set forth in subsection A of this section. However, in a case involving a criminal charge or indictment, the suspension may be delayed until the employee's case is adjudicated at the trial. Nothing in this act shall prevent the school board from proceeding against the employee during or after the suspension for termination as provided in this act.

APPENDIX G

REGULATORY PROVISIONS INVOLVED

Employee Policies and Procedures of
Independent School District No. I-06
of McCurtain County, Oklahoma
(Hayworth School District)

2211.2

SELECTION AND APPOINTMENT

Support personnel shall be appointed by the superintendent of schools. The superintendent shall inform the board in its regular meeting of any changes and shall seek the advice of the board before making any appointment, if unusual circumstances exist. All employees shall serve on a probationary basis for the first thirty (30) days.

2214

SEPARATION

The continuation of employment shall be based on the quality of work, ethical conduct, necessity of the work and the availability of district funds. Unless the continued presence of a person on a job is highly detrimental to the school system, two weeks notice shall be given before dismissal.

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

No. 92-1120

RECEIVED
JAN 26 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1992

JOYCE BROWN and LOIS SULLIVAN,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT)
and
LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON, and HERMAN HORN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Independent School District No. I-06 of McCurtain County, Oklahoma (the "School District"), Larry Thompson, Chris Columbus, Norman Ranger, James P. Brinkley and Charles Whittington (the "Board"), and Herman Horn ("Horn"), respectfully pray that this Honorable Court deny the Petitioners' request for a writ of certiorari. Respondents believe that the United States Court of Appeals for the Tenth Circuit correctly interpreted Oklahoma law when it determined that Petitioners did not have a property interest in the renewal of their expired contracts of employment. It is settled beyond dispute that property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Oklahoma law does not create in Petitioners a property interest in contract renewal.

Moreover, the issues raised by Petitioners' two questions turn entirely upon an analysis of Oklahoma law. Accordingly, the decision of the Tenth Circuit in this case presents neither a conflict among the circuit courts of appeal nor an interpretation of federal law. This case is of significance solely within the state of Oklahoma and solely because of its interpretation of Oklahoma law. For these reasons, Respondents respectfully ask that Petitioners' request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioners' Appendix A1 - A8, B1 - B9, C1 - C2 and D1 - D2.

JURISDICTIONAL STATEMENT

Respondents accept Petitioners' jurisdictional statement.

OKLAHOMA CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of OKLA. CONST. ART. X, § 26 (Supp. 1992) and OKLA. STAT. tit. 70, § 5-123 (1991) are reprinted in the Appendix to the Brief in Opposition, at A1 - A3.

STATEMENT OF THE CASE

Petitioners' Statement of the Case repeatedly characterizes as "terminations" the decisions of Respondent Board not to offer Petitioners Brown and Sullivan new contracts of employment upon the expiration of their existing contracts. Petitioners' Brief, p. 4. Yet the record establishes that the Respondent Board took absolutely no action *to bring about* the end, conclusion or finish[1] of Petitioners' employment (*see* brief in Support of Motion to Dismiss, filed August 9, 1990, *Brown v. Independent School District I-06*, No. CIV-90-311-C (E.D. Okla.); Brief in

[1] *See* Petitioners' Brief, p. 13.

Support of Motion to Dismiss, filed August 9, 1990, *Sullivan v. Independent School District I-06*, No. CIV-90-312-C (E.D. Okla.))[2]. Rather, the record shows that it is undisputed that Petitioners were employed under express written contracts with terms stating when their employment would expire:

> The contract term shall be . . . [o]n a month to month basis during the school year, beginning on the 15[th] day of August, 1988, and continuing each month thereafter *for the balance of the school fiscal year unless employment is terminated, but in no event to extend beyond June 30, 1989 unless a new written contract is entered into by the parties*. . . .

Petitioners' Appendix at A3 (emphasis added).

The only action taken by the Respondent Board was to *notify* Petitioners that the Board did not intend to enter into new contracts of employment with them for the upcoming fiscal year (*see* Exhibit D to Briefs in Support of Motion to Dismiss, filed August 9, 1990, *supra*).

Respondents understand that Petitioners now take the position that they were terminated.[3] But because whether Petitioners were, in fact, "terminated" within the meaning of OKLA. STAT. tit. 70, § 6-101.40 (1991) is central to the issues Petitioners are asking this Court to review,

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[2] By Order dated January 22, 1991, the District Court consolidated the two cases.

[3] Respondents address Petitioners' "ordinary meaning" argument concerning the definition of "termination" at p. 15, *infra*.

and because Petitioners' contention that they were "terminated" has been rejected by both the District Court and the Tenth Circuit, Respondents believe it is inappropriate for Petitioners to suggest in their Statement of the Case that the facts of this case establish that they were "terminated."

Respondents would also point out that Petitioners incorrectly assert that Petitioner Joyce Brown was first employed in August of 1981, without a written contract. Petitioners' Brief, p. 3. The undisputed facts as found by the District Court establish that Petitioner Brown was first employed in 1982 and signed a contract of employment in each year of her employment.[4] Petitioners' Appendix at B2 - B3.

The lower courts correctly concluded that Petitioners' employment status was governed by the terms of their written contracts. This conclusion is mandated not only by the terms of Petitioners' contracts, but also by express provisions of the Oklahoma Constitution and Oklahoma's statutory law. Petitioners' attempt to fabricate some kind of property interest in contract renewal from the language of OKLA. STAT. tit. 70, § 6-101.40 (1991) flies directly in the face of the Oklahoma Constitution. Likewise, their attempt to divorce their "employment status" from their

---

[4] Petitioner Lois Sullivan did work from 1975 until 1982 without signing a written employment contract. In 1982, the Oklahoma Attorney General issued an interpretation of Oklahoma law stating that it was unlawful for school districts to employ support employees except pursuant to the terms of a written contract. *See* 82 Op. Att'y. Gen. 62 (March 3, 1982), discussed at p. 13, *infra*.

"contract" is flatly contrary to Oklahoma statutory law. Because the Tenth Circuit correctly determined that Oklahoma law does not *allow* the property interests claimed by Petitioners, the Tenth Circuit's decision should stand.

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit correctly applied Oklahoma law in determining that Petitioners did not have a property interest entitling them to renewal of their expired contracts. The requested writ should also be denied because the questions presented raise only issues of Oklahoma law.

In conformity with an authorizing provision of the Oklahoma Constitution, the Oklahoma legislature has granted *teachers* the statutory right to continuing employment and contract renewal from year to year. Support employees such as Petitioners do not fall within the coverage of this continuing contract statute or the exception in the Oklahoma Constitution allowing such an employment practice. Support employees are thus prohibited by the Oklahoma Constitution from having a property interest in employment that extends beyond the term of a one-year contract.

Oklahoma law also makes it unlawful for school districts to employ support employees except pursuant to the terms of a written contract. Thus, under Oklahoma law, a support employee's employment interest is not

severable from his contract; the contract creates, limits and defines the employment interest.

Petitioners were employed under express written contracts for a definite term. Neither the contracts nor the Respondent School District's policy manual granted Petitioners a right to contract renewal. Under Oklahoma law, the *express* provisions of Petitioners' contracts must govern, and the Respondent School District's policy manual cannot be interpreted as *implying* contradictory terms.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Oklahoma Constitution *Prohibits* School District Support Employees from Having a Property Interest in *Renewal* of Their Employment Contracts from Year to Year

A. Property Interests Arise from State Law, Not Federal Law

Petitioners cite *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), for the remarkable proposition that the existence of a property interest is a matter of federal law. Petitioners' Brief, pp. 8-9. Petitioners thus suggest that *Memphis Light* reflects some departure or retreat from the holding of *Board of Regents v. Roth*, 408 U.S. 564 (1972). Yet this Court has consistently cited *Roth* for the proposition relied on by Respondents, that property interests are created by state law. Indeed, this Court in *Memphis Light* relied on *Roth* for that very point, *Memphis Light*, 436 U.S. at 9, as it did again in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985).

Respondents submit that the proper analysis of *Memphis Light* was followed by the Sixth Circuit in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991). There the issue was whether a liquor license was property under Ohio law. The Sixth Circuit stated:

> The license may rise to the level of property under the Due Process Clause even though Ohio chooses not to call it property. "[W]e must look behind labels, and decide whether the plaintiff's license was 'property' in a functional sense. . . ." In short, we look to Ohio law to determine the *nature* of the interest, not the *label* to apply to it.

Id. at 714 (citation omitted; emphasis added). The Sixth Circuit then considered the various interests that, under Ohio law, accompanied the granting of a liquor license in that state. Those interests included the statutory rights to transfer, sell, bequeath and renew the liquor license, as well as the right to a hearing before the liquor license could be revoked and the right to appeal an adverse determination. The key point, however, is that all of these appurtenant interests stemmed from Ohio law, not federal law. Accordingly, it cannot be disputed that the *source* of any property interest entitled to protection under the fourteenth amendment must be *state* law.

In this case, an examination of the *nature* of the interest granted to Petitioners by Oklahoma law leads to the inescapable conclusion that Oklahoma has not created in them a property interest in the renewal of their expired contracts.

B. Under Oklahoma Law, Petitioners' Property Interests Were *Limited* to the Duration of Their Employment Contracts

Petitioners rely on OKLA. STAT. tit. 70, § 6-101.40 (1991), which provides that support employees[5] shall be subject to "suspension, demotion or termination only for cause." Petitioners' Appendix at F1. Petitioners contend that this provision establishes a property interest in continued employment, entitling them to renewal of their expired contracts from year to year, regardless of the express provision to the contrary in their written contracts.

Neither Petitioners nor Respondents take issue with the Tenth Circuit's earlier construction of the prior codification of section 6-101.40 in *Goudeau v. School District No. 37*, 823 F.2d 1429 (10th Cir. 1987). There the court held that a support employee who was *terminated* by the school district *during the term of her contract* had a right to a due process hearing. *Id.* at 1430, n. 1. Respondents agree that support employees who fall within the coverage of this statute clearly have a property interest in continued employment for the *term* of their contracts. But at least since *Board of Regents v. Roth*, 408 U.S. 564 (1972), it has been well established that a property interest in employment, once created, is not infinite. Rather, a property interest in employment can exist for the duration of a

---

[5] All school district employees in Oklahoma fall into one of two categories: certificated personnel (teachers and administrators, OKLA. STAT. tit. 70, § 6-101.3 (1991)), or support employees (non-certified personnel such as secretaries, bus drivers, cafeteria workers, etc.).

specified term. Once that term expires, as did Petitioners' herein, the property interest also expires, unless state law has created an interest in contract *renewal*.

Petitioners urge that section 6-101.40 does create an interest in contract renewal in favor of support employees. Yet Petitioners' interpretation of section 6-101.40 is squarely prohibited by the "debt limitation" provision of the Oklahoma Constitution, OKLA. CONST. Art. X, § 26 (Supp. 1992) Appendix at A1-A3. This constitutional provision prohibits political subdivisions, such as school districts, from incurring any indebtedness beyond the income and revenue available for the current fiscal year.

The importance of this constitutional provision to matters relating to the expenditure of public funds was made clear by the Oklahoma Supreme Court in *Brookman Co. v. Board of Commissioners*, 136 Okla. 85, 276 P. 474 (1929). Referring to OKLA. CONST. Art. X, § 26, the court stated:

> That provision is subject to no emergency, pays no heed to convenience, expediency or emergency. It is sane, safe, unconditional, and, so far as human documents can be so regarded, should be held sacred in its observance, interpretation, and enforcement. Once this clear protecting mandate is whittled away, reasoned around, or disregarded, for any cause, the chief guaranty of our orderly municipal progress, whether in state, county, city, town, township, or school district, is threatened.

Id. at ___, 276 P. at 477.

Oklahoma courts have cited this provision of the Oklahoma Constitution as prohibiting school district

employees from having multi-year contracts. *Board of Education v. Challey*, 153 Okla. 273, 5 P.2d 747 (1931); *Gentis v. Hunt*, 121 Okla. 71, 247 P. 358 (1925). In *Dungan v. Independent School District No. 39*, 182 Okla. 385, 77 P.2d 1117 (1938), the plaintiff was a school district superintendent who had been employed under a three-year contract pursuant to a statute (section 6875) that purported to authorize such three-year contracts. The plaintiff brought suit after the board of education refused to honor the third year of the contract. The trial court sustained the defendant's demurrer and held section 6875 unconstitutional. On appeal, the Oklahoma Supreme Court stated:

> We think the trial court committed no error in so holding. Insofar as section 6875 . . . authorizes an independent school district board to contract with a superintendent during one fiscal year for services to be performed during a subsequent fiscal year, it is unconstitutional, being in violation of section 26, article 10 of the Oklahoma Constitution. . . . Therefore, insofar as the petition relies on the contract entered into in 1932, no cause of action is stated and the trial court properly sustained the general demurrer thereto.

Id. at ___, 77 P.2d at 1119.

This authority, standing alone, amply demonstrates the flaw in Petitioners' argument. But there is far clearer proof of Petitioners' faulty reasoning in the connection between OKLA. CONST. Art. X, § 26 (Supp. 1992) and the statutory right to continuing employment that Oklahoma has granted to *teachers*.

As Petitioners point out at page 12 of their brief, as to teachers the Oklahoma legislature has recognized a distinction between "nonrenewal" of employment and "dismissal." This is because Oklahoma's *teachers*, unlike support employees, have the *express* statutory right to continued employment from one year to another. This law, found at OKLA. STAT. tit. 70, § 6-101 (1991), provides that if a board of education does not notify a teacher prior to April 10 of its desire not to reemploy him for the upcoming school year, such teacher shall automatically be reemployed by operation of law for another fiscal year.[6]

Before this statutory right to continuing employment could be granted, however, OKLA. CONST. Art. X, § 26 had to be *amended* to add the following proviso:

> . . . and provided further that nothing in this section shall prevent any school district from contracting *with certificated personnel* for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed (emphasis added).

See proposed constitutional amendment, 1955 Okla. Sess. Laws 561.

The constitutional amendment to Article X, section 26 that allowed the legislature to grant continuing contract rights to teachers is specifically *limited* to certificated personnel. Thus, school districts in Oklahoma continue to be prohibited from entering into multi-year contracts or continuing contracts with support employees.

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[6] The fiscal year for school districts in Oklahoma is July 1 through June 30. OKLA. CONST. Art. X, § 1 (1991).

This conclusion is further supported by an opinion of the Oklahoma Attorney General. In 80 Op. Att'y. Gen. 272 (November 6, 1980), the Attorney General discussed the interplay between OKLA. CONST. Art. X, § 26 and the teachers' continuing contract law, observing:

> Art. 10, § 26 is the "debt limitation" provision of the Constitution which . . . precludes local political subdivisions from incurring any indebtedness beyond the income and revenue for the current fiscal year. The exception provided . . . is for teacher contracts entered into in the current fiscal year to become effective in the next fiscal year. The proviso is a clear recognition of public school employment practices and the operation of the so-called "continuing contract" law for public school teachers.
>
> * * *
>
> Were it not for the exception in the last proviso of Art. 10, § 26, the "continuing contract" law would be of doubtful constitutionality.

In the face of this authority, the Tenth Circuit properly concluded that the protection against "termination" conferred on support employees by OKLA. STAT. tit. 70, § 6-101.40 (1991) could mean only "termination under an extant contract." *See* Petitioners' Appendix at A6. The interpretation urged by Petitioners would have resulted in the creation of a property interest in continued employment from year to year in *noncertified* school district employees, a result the Oklahoma Constitution forbids.

Petitioners' reasoning also suffers other flaws. Petitioners pay only lip service to their written contracts,

arguing that *"independent"* of any contract, section 6-101.40 creates a property interest in the Petitioners' retention of their *"employment status."* Petitioners' Brief at 15, n. 11 (emphasis in original). Yet the law of Oklahoma makes clear that it is illegal for a school district to expend over $500 for a support employee's salary "except in accordance with the provisions of a written contract. . . ." OKLA STAT. tit. 70, § 5-123 (1991); Appendix at A3; 82 Op. Att'y. Gen. 62 (March 3, 1982). Oklahoma law thus rejects the distinction Petitioners seek to draw between "contract" and "employment status." To the contrary, Oklahoma law clearly and affirmatively *links* a school employee's employment status with having a lawful written contract. Petitioners' suggestion that under Oklahoma law they can have some "employment status" that is "independent" of the terms of their written contracts is simply wrong.

Petitioners' Brief is devoid of any authority or argument regarding these points. The arguments Petitioners do raise can be disposed of easily.

Petitioners' attempt to compare their situation to that of the employee in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), cannot withstand scrutiny. *See* Petitioners' Brief, pp. 11-12. The parties in *Loudermill* conceded that Ohio law granted the employee there a property interest in continued employment. *Loudermill*, 470 U.S. at 538-39. The issue decided by this Court was "what process is due" under the fourteenth amendment. *Id.* at 541. Neither the decision in *Loudermill* nor the Ohio law cited therein is in any way instructive on the issue of Petitioners' claim to a property interest under Oklahoma law in the renewal of their expired contracts.

Petitioners also argue that the Oklahoma legislature must have intentionally used the "more generic" but undefined term "termination" in OKLA. STAT. tit. 70, § 6-101.40 (1991) to address situations such as theirs. Petitioners' Brief, pp. 12-13. Petitioners point out that in OKLA. STAT. tit. 70, § 6-101.41 (1991),[7] the defined[8] terms "dismissed" and "not reemployed" are used. The problem with this approach is that it proves too much. If, as Petitioners imply, the Oklahoma legislature intended "termination" to encompass both "dismissal" and "non-reemployment," why did the legislature not use "terminated" in section 6-101.41? Respondents submit that it is equally plausible to conclude that the legislature purposely avoided "termination" in § 6-101.41 precisely

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[7] OKLA. STAT.tit. 70, § 6-101.41 (1991) provides:

> A. A school support employee convicted of a felony shall be dismissed or not reemployed unless a presidential or gubernational pardon has been issued.
>
> B. A school support employee may be dismissed, refused employment or not reemployed after a finding that such person has engaged in criminal sexual activity or sexual misconduct that has impeded the effectiveness of the individual's performance of school duties.

[8] Petitioners fail to note that these terms are *defined* solely with reference to actions against *certificated* employees. OKLA. STAT. tit. 70, § 6-101.3 (1991) provides:

> 2. "Dismissal" means the discontinuance of the teaching service of an administrator or teacher during the term of a written contract, as provided by law;
>
> 3. "Nonreemployment" means the nonrenewal of an administrator's or teacher's contract upon expiration of the contract[.]

because termination is synonymous with dismissal, and the legislature wanted to make it clear that school districts should not only terminate the existing contract of a support employee convicted of a felony, but should also decline to reemploy[9] such a support employee if his current contract had already expired. This reading suggests that the legislature viewed "termination" as a more narrow term than "dismissal" and "nonreemployment," not, as Petitioners suggest, a more inclusive term.

Petitioners suggest that the "ordinary meaning" of "termination" is broad enough to encompass the failure of the Respondent Board to renew Petitioners' contracts. Petitioners' Brief, p. 13. Yet, the same source cited by Petitioners[10] also defines "termination" as "the act of terminating." "Terminate," in turn, is defined as "to bring to an ending or cessation in time, sequence, or continuity," and "to discontinue the employment of." By the "ordinary meaning" of these definitions, an affirmative act is required to bring about a termination. Yet the Respondent Board took no action to bring Petitioners' employment to an end; their contracts expired by their own terms.

As for Petitioners' reliance on the Oklahoma Legislature's preference for liberal interpretation of statutes, it need only be noted that statutory interpretations that are prohibited by the Oklahoma Constitution cannot be

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[9] Petitioners also fail to note that the term defined in section 6-101.3 is "nonreemployment," yet the term used in 6-101.41 is "not reemployed." *See* nn. 7 and 8, *supra*.

[10] Websters Unabridged Dictionary 1883 (2d ed. 1983).

resuscitated under the guise of "liberal statutory interpretation."

Likewise, there was no suggestion in any of the Oklahoma municipal employee cases cited by Petitioners[11] that OKLA. CONST. Art. X, § 26 was in any way implicated. Respondents are aware of no Oklahoma statute requiring municipal employees to work under annual contracts of employment, as are school district employees.[12]

Petitioners argue that the Tenth Circuit has approved a "crabbed construction" of "termination" that renders section 6-101.40 an "illusory cruel joke." Petitioners' Brief, pp. 15-17. Yet it is the Oklahoma Constitution, not the Tenth Circuit's reading of section 6-101.40, that makes the property interest sought by Petitioners "illusory." Moreover, as the Tenth Circuit's holding in *Goudeau*, 823 F.2d at 1431-32, illustrates, the protection against termination without cause is not at all illusory during the term of a support employee's contract. In addition, section 6-101.40 prohibits school districts from employing support employees under contracts that are terminable at will. Clearly, such a result is not an illusory protection.

Finally, Petitioners' suggestion that there is now an inter-circuit split as a result of the Tenth Circuit's decision in this case is pure fabrication. Petitioners' Brief, pp. 8, 17-18. The cases cited by Petitioners do not deal with constitutional/statutory schemes comparable to that of

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[11] *See Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985); *Hall v. O'Keefe*, 617 P.2d 196 (Okla. 1980); *Umholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977).

[12] *See* p. 13, *supra*.

Oklahoma. Nor is it at all remarkable for a court of appeals to conclude, as did the Tenth Circuit here, that Petitioners' property interests were created by their contracts and thus expired when their contracts of employment expired. *See Board of Regents v. Roth*, 408 U.S. at 578.

Petitioners' arguments are without merit. Their request for a writ of certiorari to further litigate a question of Oklahoma law should be denied.

II. Respondent School District's Policies Cannot Create a Property Interest Prohibited by the Oklahoma Constitution or Be Construed to Contradict the Express Terms of Petitioners' Written Contracts

Petitioners assert that the terms of the Respondent School District's policy manual[13] created in them a property interest in the renewal of their expired contracts of employment. Without further belaboring the point, Respondents submit that the terms of the policy manual cannot, as a matter of Oklahoma law, create a property interest in continued employment from year to year when such is prohibited by the Oklahoma Constitution. Moreover, the language from the policy manual on which Petitioners rely says absolutely *nothing* about contract renewal. Instead, it speaks of "dismissal" and "continuation of employment." As even Petitioners concede that a "dismissal" under Oklahoma law means the interruption of an existing contractual relationship, "continuation of employment" must logically refer to the continuation of

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[13] *See* Petitioners' Appendix at G1.

an *existing* contractual relationship. Such an interpretation is perfectly consistent with Oklahoma law.

Given that the policy manual is silent as to contract renewal, Petitioners seek to have this Court *imply* a term not found in the policy manual that is directly contrary to the express provisions of their contracts. But in *Fox v. Cities Service Oil Co.*, 201 Okla. 17, 200 P.2d 398 (1948), the Oklahoma Supreme Court held that an *express contract* on a given subject *excludes* the possibility of an *implied contract* of a different or contradictory nature. Thus, under Oklahoma law, this Court should not imply a term that is contradictory to an express term in a written contract. For this reason, Petitioners' reliance on the policy manual is misplaced.

In addition, the construction given by the Respondent School District to its own policy manual must control if that construction is reasonable. *Board of Education v. McCluskey*, 458 U.S. 966 (1982). In *McCluskey*, this Court took the lower court to task for substituting its judgment for the judgment of the board of education concerning the interpretation of the school district's regulations. The Court held that the board of education's construction of its own rules must govern if that construction is reasonable. *Id.* at 970-71. In this case, the Respondent Board's construction of its policy manual, as adopted by the Tenth Circuit, is perfectly reasonable and consistent with Oklahoma law.

Finally, Petitioners seek to rely on allegations contained in Petitioners' Affidavits that Respondent Horn made verbal assurances to them of continued employment. Petitioners' Brief at 23-24. This claim was never

raised before the Tenth Circuit and is nowhere discussed in Petitioners' briefs to the Tenth Circuit. *See* Appellants' Brief-in-Chief and Reply Brief of Appellants, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058). Accordingly, Petitioners cannot now raise such a claim before this Court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981).

Moreover, reliance on such alleged verbal assurances is misplaced for another reason. The Oklahoma legislature unequivocally granted the authority to employ support employees to *boards of education*. OKLA. STAT. tit. 70, § 5-117 (1991).[14] For Respondent Horn to have had any ability to bind Respondent School District, Respondent Board would have had to delegate such authority to him. Oklahoma law does not allow such delegation, however.

In *Mindemann v. Independent School District No. 6*, 771 P.2d 996 (Okla. 1989), the Oklahoma Supreme Court invalidated a purported delegation by a board of education of its statutory authority. The statute in question, OKLA. STAT. tit. 70, § 5-117, grants specific, enumerated powers to boards of education and is the identical statute implicated by Petitioners' argument. The issue in *Mindemann* was whether a board of education could voluntarily surrender its statutory authority to fix

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[14] A. The board of education of each school district shall have the power to:

* * *

14. Contract with and fix the duties and compensation of . . . superintendents, principals, teachers, bus drivers, janitors, and other necessary employees of the district. . . .

teachers' duties by agreeing to submit such questions to binding arbitration. The Oklahoma Supreme Court concluded that the board could not surrender this nondelegable and exclusive authority.

The Respondent Board's statutory authority under section 5-117 to contract with support employees is exclusive and nondelegable, just as is its statutory duty to fix teachers' duties. It would be extremely anomalous, to say the least, to conclude that a board of education's duty to fix teachers' duties under section 5-117 cannot be delegated, but that its duty to contract with employees under the same statute can be delegated. Because school districts can make employment contracts *only* through the actions of the board of education acting in its capacity as a board, *School District No. 39 v. Shelton*, 26 Okla. 229, 109 P. 67 (1910), Petitioners' reliance on the alleged statements of Respondent Horn is misplaced.

CONCLUSION

For the reasons stated herein, Respondents pray that Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Counsel of Record
for Respondents

APPENDIX A

OKLA. CONST. Art. X, § 26 (Supp. 1992)

(a) Except as herein otherwise provided, no county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that if a school district has an absolute need therefor, such district may, with the assent of three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) but not exceeding ten percent (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness, for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment; and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need, unless otherwise provided by law. Provided further, that if a city or town has an absolute need therefor, such city or town may, with the assent of

three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five percent (5%) but not exceeding ten percent (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness, and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need unless otherwise provided by law. Provided, further, that any county, city, town, school district, or other political corporation, or subdivision of the state, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five (25) years from the time of contracting the same, and provided further that nothing in this section shall prevent any school district from contracting with certificated personnel for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed by law.

(b) If a county approves an exemption of household goods of the heads of families and livestock employed in support of the family from ad valorem taxation pursuant to the provisions of subsection (b) of Section 6 of this article, the percentage limitations on indebtedness as specified in subsection (a) of this section for political subdivisions or political corporations located in any such county shall be adjusted by multiplying the percentage

levels specified in subsection (a) of this section by the millage adjustment factor as specified in subsection (b) of Section 8A of this article.

(c) If approved by the people, the amendment to this section shall become effective January 1, 1993.

OKLA. STAT. tit. 70, § 5-123 (1991)

No expenditure involving an amount greater than Five Hundred Dollars ($500.00) shall be made by a board of education except in accordance with the provisions of a written contract or purchase order, and no contract involving an expenditure of more than Seven Thousand Five Hundred Dollars ($7,500.00) for the purpose of erecting any public building or making any improvements shall be made except upon sealed proposals and to the lowest responsible bidder. Provided, this section shall not be construed to prohibit a school district from erecting a building or making improvements on a force account basis. Contracts with any state agency for the purpose of emergency asbestos abatement shall be exempt from the provisions of this section.

Supreme Court, U.S.
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No. 92-1120

In The

Supreme Court of the United States

October Term, 1992

JOYCE BROWN

and

LOIS SULLIVAN,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT)

and

LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON, and HERMAN HORN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

RICHARD B. WILKINSON
Counsel of Record
Associate General Counsel
DAVID F. MORRIS
General Counsel
Oklahoma Education Association
Post Office Box 18485
Oklahoma City, OK 73154
(405) 528-7785

DENNIS W. ARROW
Oklahoma City University School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5361

GEORGE WALTERS
700 South Park Drive
Broken Bow, OK 74728
(405) 584-2726

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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In The

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In addition to tendering two arguments first raised in the Brief in Opposition (which will be succinctly addressed immediately following this Introduction),

Respondents have asserted that Petitioners' citation of *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), was for the purpose of suggesting "that *Memphis Light* reflects some departure or retreat from the holding of *Board of Regents v. Roth*, 408 U.S. 564 (1972)." Brief in Opposition at 6. As this Court will discover, both the passage from *Memphis Light* quoted *verbatim* in the Petition, *see* Petition for Certiorari at 8-9, *and the residuum of Petitioners' argument therein*, indicate clearly that Petitioners are not only aware of, but also have correctly contextualized, the appropriate sweep of federal *vis-a-vis* state law in the property interest/procedural due process context.[1] Manifestly, *Memphis Light* and *Roth* are consistent, and Petitioners believe that the quotation from the former adduced in the Petition speaks quite clearly for itself.

I. RESPONDENTS' RELIANCE ON ARTICLE X, SECTION 26 OF THE OKLAHOMA CONSTITUTION IS UNAVAILING TO DEFEAT PETITIONERS' PROPERTY INTEREST CLAIM HEREIN.

Petitioners Brown and Sullivan, (now) former support employees of Respondent School Board, have urged throughout their Petition that a "termination only for cause" provision in state statute, OKLA. STAT. ANN. tit.

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[1] *See also* Petition for Certiorari at 10 (emphasis added)("In language too familiar to warrant requotation, this Court, in [*Roth*], has held that fourteenth amendment-cognizable property interests are *created by* state law.").

70, § 6-101.40 (West 1989 & Supp. 1992), creates a property interest in their employment *status* sufficient to trigger procedural due process guarantees.[2] Respondents have now countered with the assertion that such a result is foreclosed by the "debt limitation" provision of OKLA. CONST. art. X, § 26.

Article X, section 26 of the Oklahoma Constitution does, in fact, limit the amount of debt which the state or its political subdivisions may incur. Respondents seek to extract from this limitation a state constitutional preclusion of any procedural due process-protected property interest extending for longer than the duration of Petitioners' one-year contracts. Respondents rely in large measure on a proviso, added subsequent to the original constitutional debt limitation, essentially permitting two-year contracts for "certified" school district personnel (Petitioner support employees, unlike, for example, teachers, are not "certified.") *See* Brief in Opposition at 9-13. But the argument is necessarily based on a fatally-

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[2] Petitioners, who cited substantial state and federal authority in their Petition for the well-settled proposition that "termination only for cause" provisions *ipso facto* create cognizable property interests, remain confident of that conclusion, which has not been impeached by Respondents' argument or authority. Rather, the gravamen of Respondents' position on *that* issue is that Petitioners were simply not "terminated." *E.g.*, Brief in Opposition at 4, 8, 14-17. (To the contrary, Petitioners maintain that "discharge," "nonrenewal," the "lack of reemployment," "dismissal," "deciding to nonrenew," "notification" of decisions to nonrenew, *see* Brief in Opposition at 3, and all other similar semantic reformulations, are "terminations" as that term is employed in § 6-101.40. *See* Petition for Certiorari at 9-18.)

flawed premise: that teachers' "continuing contracts," *see* OKLA. STAT. ANN. tit. 70, § 6-101 (West 1989 & Supp. 1992), to the exclusion of the "termination only for cause" statutes applicable to them, *e.g.*, *id.*, § 6-103, create *their* property interests in continued employment. A straightforward walk-through of Respondents' Oklahoma Constitution-based contention will demonstrate both the necessary existence of, and fatality of the defect in that premise.

First, Respondents' reliance on the premise that *teachers'* property interests are created by Oklahoma's "continuing contract" law, OKLA. STAT. ANN. tit. 70, § 6-101 (West 1989 & Supp. 1992), is compelled by their position that certified teachers (but not support employees) have fourteenth amendment-protected property interests.[3] While only "certified" personnel are

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[3] A further logical consequence of Respondents' state constitution/debt limitation argument would seem initially to obtain. Since *only* certified *school* personnel are exempted by the proviso to the Oklahoma Constitution's debt-limitation provision, *no other employee of the state – or any of its political subdivisions* – could enjoy a protected property interest extending *beyond a particular fiscal year* pursuant to Respondents' state constitutional analysis. But Respondents – apparently realizing that such an interpretation proves *much* too much – attempt to rationalize the fact that controlling state caselaw has expressly rejected *that* conclusion with the observation that "Respondents are aware of no Oklahoma statute requiring municipal employees to work under annual contracts of employment, as are school district employees." Brief in Opposition at 16. The observation is concluded elsewhere in Respondents' argument with a *non sequitur*:

> Oklahoma law *thus* rejects the distinction between "contract" and "employment status". To the contrary,

expressly provided with "continuing contracts" by state law, *both* certified teachers *and* support employees are provided with "termination only for cause" and "hearing" guarantees in state statutes. *Compare, e.g.*, OKLA.

> Oklahoma law clearly and affirmatively *links* a school employee's employment status with having a lawful written contract.

Brief in Opposition at 13 (former emphasis added; latter emphasis in original).

First, the conclusion is a *non sequitur* since a simple requirement that a written contract issue does not, in any logical manner, negate the possibility that a property interest in employment status may be created by a "termination for cause" provision elsewhere in the statutory scheme. *See, e.g., Vail v. Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd*, 466 U.S. 377 (1984) (emphasis in original deleted; emphasis added) ("Even if we were to assume arguendo that *no* enforcable contract under state law existed between Vail and the Board, we are not prepared to hold that this alone precludes the establishment of a protected property interest.").

Second, Respondents offer not a scintilla of authority on behalf of their conclusion.

Third, the conclusion is foreclosed by Oklahoma caselaw grounding municipal employees' property interests in the apposite "termination only for cause" provisions, *not* in any "continuing contract" law:

> The applicable Charter provision . . . provided that all employees . . . shall be suspended without pay, demoted or removed from the same *only for good and sufficient cause*. This language taken alone would clearly confer a property right in continued employment.

Umholtz v. City of Tulsa, 565 P.2d 15, 23 (Okla. 1977) *Cf. Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985) (construing *Umholtz* in light of this Court's subsequent decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)). Neither case relies to the slightest degree on the existence *vel non* of any employment contract.

STAT. ANN. tit. 70, § 6-103 (West 1989 & Supp. 1992) *and id.*, § 6-103.3 *with id.*, § 6-101.40 *and id.*, § 6-101.46.

Second, the Oklahoma Supreme Court has *expressly relied* upon "termination only for cause" provisions in finding that tenured certified *teachers* enjoy fourteenth amendment-protected property interests in their continued employment. *E.g., Short v. Kiamichi Area Vo-Tech School*, 761 P.2d 472, 475 (Okla. 1988).

Third, that court has also relied upon "termination only for cause" provisions – virtually always *to the exclusion of* any "continuing contract" analysis – in public employment contexts apart from the public school arena. *See, e.g., supra* note 3.

Fourth, *there is simply no conflict whatsoever* between Petitioners' interpretation of the statutory "termination only for cause" provision, OKLA. STAT. ANN. tit. 6-101.40 (West 1989 & Supp. 1992), and OKLA. CONST. art. X, § 26, even assuming *arguendo* the credibility of *Respondents'* proffered interpretation of that constitutional provision. Section 6-101.40 expressly provides that it "shall not be construed to prevent layoffs for lack of funds. . . . " And for that matter, Respondent School Board's published Personnel Policy, see Petition for Certiorari at G1, provides that "continuation of employment" shall be based, in part, on the "availability of district funds." *Id.* Given such fiscal protections, any alleged conflict with the Oklahoma Constitution is a false one; in any case, Respondents' proffered construction of the state

constitution is both logically untenable and foreclosed by controlling state caselaw.[4]

Finally, apparently in light of the above analysis (which was proffered by Petitioners to the court of appeals below, *see* Reply Brief of Appellants at 13-18, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058)), that court gave no weight whatsoever to Respondents' state constitution-based argument in its opinion. Petitioners respectfully submit that in *that* respect, the court of appeals below was manifestly correct.

II. THE PROVISIONS OF RESPONDENT SCHOOL BOARD'S PUBLISHED PERSONNEL POLICY ARE COGNIZABLE AS IMPLIED CONTRACT TERMS.

In urging upon this Court the conclusion that Respondent School District's "policy manual cannot, as a

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[4] Respondents reliance on *dictum* from an Oklahoma Attorney General's opinion, *see* Brief in Opposition at 12, is equally unavailing. As indicated above, pursuant to Respondents' untenable state constitutional analysis, Petitioners' interpretation of § 6-101.40 (the "termination only for cause" statutory provision applicable to support employees) would cause that statute to be in violation of the Oklahoma Constitution. But in such cases, the Oklahoma Supreme Court has held that Attorney General opinions are "advisory only, and thus not binding until finally so determined by action in the District Court of this state." *State* ex rel. *York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984). And not only is the cited Attorney General's opinion speculative *by its own terms*, but no state district court is likely to sustain Respondent's state constitutional argument in light of the Oklahoma Supreme Court's directly conflicting precedent. *See, e.g., supra* note 3.

matter of Oklahoma law, create a property interest in continued employment. . . . ", Brief in Opposition at 17, Respondents initially *assume the conclusion* that the terms "separation" and "continuation of employment," as used in that Policy, *see* Petition for Certiorari, Appendix at G1, do not encompass the decision not to renew Petitioner's employment. But as that issue *was* confronted in the Petition for Certiorari at 21-24, no further comment will be addressed to that point herein.

But in its Brief in Opposition, Respondents also proffer the new contention that Petitioner support employees may not rely on the Policy, since to do so would violate Oklahoma caselaw precluding the implication of contract terms "different or contradictory," Brief in Opposition at 18, to their express employment contracts. Petitioners only authority for this proposition is *Fox v. Cities Service Oil Co.*, 201 Okla. 17, 200 P.2d 398 (1948), a *general* contract law case. For two reasons, Respondents' position is fatuous.

First, controlling Oklahoma caselaw – in the *specific* school-employment context – has applied the "inconsistency" (between express and implied contract terms) analysis as follows:

> The word inconsistent means mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of one implies the abrogation or abandonment of the other.

Miller v. Independent School District No. 56, 609 P.2d 756, 759 (Okla. 1980). The court then applied that premise to a factual setting quite germane and analogous to the

instant facts, *id.*; that application, in short, makes abundantly clear that Petitioner's interpretation of the Policy and employment contracts, supported by the Policy's plain meaning,[5] *see* Petition for Certiorari at 22-23, reveals no "inconsistency" whatsoever.

Equally fundamentally, *Miller* held foursquare that school board personnel policies *are* cognizable as "implied contract terms." *Id.*

CONCLUSION

Subsequent to advancing the untenable state-law arguments replied to herein, Respondents have attempted to deny the existence of an inter-circuit conflict focused on the ability of contract durations to limit the *term* of property interests granted by "termination only for cause" guarantees. Respondents attempt to deny the conflict, in essence, since "the cases cited by Petitioners do not deal with [comparable] constitutional/statutory schemes. . . . " Brief in Opposition at 16-17. Petitioners have established above that the Oklahoma *constitutional* scheme is irrelevant to the instant dispute, and maintain further that the precise contours of the *statutory* schemes at issue in the court of appeals decisions cited by Petitioners, *see* Petition for Certiorari at 18, are also irrelevant

[5] As has been noted in the Petition for Certiorari at 23, Petitioners' interpretation of the Policy was supported by Respondent Horn, School Superintendent and Executive Officer, OKLA. STAT. ANN. tit. 70, § 5-106 (West 1989), of Respondent School Board.

in light of the categorical "termination only for cause"/ property interest approaches taken by those courts.

In light of both the doctrinal and practical consequences of the approach taken by the court of appeals below, *see* Petition for Certiorari at 24, Petitioners respectfully pray that this Court issue the Writ herein, or alternatively, that it vacate and remand in light of appropriate precedents of this Court.

Respectfully submitted,

RICHARD B. WILKINSON
Counsel of Record
Associate General Counsel
DAVID F. MORRIS
General Counsel
Oklahoma Education Association
Post Office Box 18485
Oklahoma City, OK 73154
(405) 528-7785

DENNIS W. ARROW
Oklahoma City University
School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5361

GEORGE WALTERS
700 South Park Drive
Broken Bow, OK 74728
(405) 584-2726

Counsel for Petitioners